



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I  
ONE CONGRESS STREET SUITE 1100  
BOSTON, MASSACHUSETTS 02114-2023

December 22, 2003

Richard E. Wardwell, Chair  
Board of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Re: Water Quality Certification  
Flagstaff Storage Project  
FERC No. L-19313-32-G-N

Dear Mr. Wardwell:

On November 14, 2003, Maine's Department of Environmental Protection ("DEP") issued a Clean Water Act ("CWA") § 401 water quality certification for the Flagstaff Storage Project. Several environmental groups filed an appeal of the certification with the Board of Environmental Protection ("BEP") on December 10, 2003. Region I of the U.S. Environmental Protection Agency ("EPA") supports this appeal for the reasons discussed in the comments attached hereto. EPA believes the certification should be denied without prejudice and a proper evaluation under the state's water quality standards be conducted.

EPA has a strong interest in ensuring that this hydropower project is licensed and operated in a manner that is consistent with federal and state environmental requirements, including state water quality standards. EPA has been involved in the environmental reviews of the Flagstaff Project since at least 1995, and we have provided comments to the project applicant, DEP, and the Federal Energy Regulatory Commission ("FERC") on several occasions during that period.<sup>1</sup> EPA has raised concerns over the project's impacts on wetlands and wildlife; aquatic life, including cold water fisheries; mercury levels; downstream uses (Dead River); and recreational flow releases. We believe that DEP's recent water quality certification for the project is not consistent with Maine's water quality standards, nor is it consistent with Maine's current inclusion of Flagstaff Lake on the § 305(b)/§ 303(d) list as being impaired for aquatic life uses due to

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<sup>1</sup>EPA comment letters include 9/18/95 comments to Cental Maine Power on Initial Consultation Document; 1/15/1998 comments to FERC on Draft Environmental Assessment; and 11/10/2003 comments to Maine DEP on Draft Water Quality Certification.

drawdowns. Rather, it represents either a conclusion that is completely unsupported by the facts, or a new interpretation of state law that is tantamount to a revised water quality standard, which may not be implemented for federal law purposes unless and until approved by EPA. Either way, we believe the certification should be denied without prejudice and a proper evaluation under the state's water quality standards be conducted.

Please contact me at 617-918-1561 or Ann Williams in EPA's Office of Regional Counsel at 617-918-1097 if you would like to discuss this situation further.

Sincerely,

Stephen J. Silva, Director,  
EPA Maine Program

Attachments

cc: Dawn Gallagher, Commissioner, Maine DEP  
Jon Edwards, Assistant Attorney General, Maine AG's Office



*Attachment to December 22, 2003 letter from Stephen Silva, EPA, to Richard Wardwell, Maine BEP, regarding the Flagstaff Lake Project*

Flagstaff Lake is classified as Class GPA under Maine's water quality standards. According to 38 MRSA § 465-A, Class GPA waters are to be of the quality suitable for, among other things, habitat for fish and other aquatic life. Such habitat is to be characterized as "natural." Pursuant to 38 MRSA § 464 (9), existing hydropower impoundments which are classified as GPA but which do not satisfy the habitat and aquatic life criteria of GPA (i.e., "natural" habitat) must at a *minimum*, meet the Class C aquatic life criteria set forth in 38 MRSA § 465(4)(C). Flagstaff Lake does not meet the natural habitat criteria of Class GPA. The lake is therefore required to meet the Class C criteria, which allow some changes to aquatic life provided that the waters are "of sufficient quality to support all species of fish indigenous to the ... waters and maintain the structure and function of the resident biological community."<sup>1</sup> "Resident biological community" is defined in 38 MRSA § 466(10) to mean "aquatic life expected to exist in a habitat which is free from the influence of the discharge of any pollutant. This shall be established by accepted biomonitoring techniques."

The existing drawdown regime of the Flagstaff Project has dramatic effects on Flagstaff Lake and its associated aquatic habitat. Since at least 1998, the relevant section of Flagstaff Lake [ID# 309 0038] has been included on the State's lists of impaired waters. In 1998, it was listed on Maine's CWA § 303(d) list of impaired waterbodies due to "habitat loss." In Maine's 2002 integrated CWA § 305(b)/§303(d) list, Flagstaff was listed in Category 4-C ("lake waters with impairment not caused by a pollutant"), and the impaired use and cause are described as "aquatic life: drawdown." Thus, the State has recognized that Flagstaff Lake does not currently meet applicable water quality standards – i.e., the Class C criteria.

Some of the drawdown effects are described in FERC's Final Environmental Assessment (FEA). The FEA found that while some salmonids, specifically brook trout and landlocked Atlantic salmon, are present in Flagstaff Lake and its tributaries, cold water fish (which are part of the resident biological community) are not abundant because of the seasonably unsuitable habitat conditions and elevated summer water temperatures due to dewatering, and competition from warm water species. *FEA* at 29. The FEA also found that large drawdowns of Flagstaff Lake drastically reduce the amount of year round habitat for fish and aquatic macroinvertebrates, "which changes the structure of the lake's aquatic community and can influence the assemblage and relative abundance of fish species and their forage base of aquatic invertebrates." *Id.* at 71.

Notwithstanding these effects and the acknowledged existing impairment of uses, which have occurred with a long term average maximum winter drawdown of either 17 feet (*FEA* at 6 and 38) or 21 feet (*Certification* at 2), DEP's final certification allows a 24-foot winter drawdown, which results in a loss of 87% of the total lake volume in the winter. *Certification* at page 7,

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<sup>1</sup>38 MRSA §§ 464 (9)(A)-(D) currently apply only to the Ripogenus impoundment and are not relevant to the Flagstaff impoundment. This subcategory of impoundments with less stringent criteria was established on the basis of an EPA-approved use attainability analysis (UAA) for the unique conditions of that specific waterbody.



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paragraph 5.d. The certification also allows, in certain circumstances, a drawdown of up to 36 feet, which the certification acknowledges “would eliminate practically all aquatic habitat and would physically constrain fish and other aquatic resources to a very small area.” *Id.* Specifically, such a drawdown would reduce the lake from its full pond surface area of 17,695 acres to 137 acres. The certification completely fails to explain how such a loss of water and habitat from either the 24-foot or 36-foot drawdown is consistent with the Class C criteria. The certification merely concludes that the 24-foot drawdown “balances the need for storage with the needs of the aquatic community,” that the 36-foot drawdown is reasonable for flood control purposes, and that, “[t]herefore, there is a reasonable assurance that ... these waters will be suitable for the designated uses of habitat for fish....” *Id.* (emphasis added).

These conclusions reflect a “balancing” of uses rather than an evaluation of whether Class C criteria can be met. While some form of balancing may be appropriate in the context of a use attainability analysis (“UAA”) (discussed further below), it is not appropriate for determining whether the aquatic uses and Class C criteria will be supported. The certification’s conclusions are at odds with Flagstaff Lake’s inclusion on the § 305(b)/§ 303(d) list of impaired waters, as noted above. They are also at odds with DEP staff’s evaluations and recommendations, which have been well documented since 1993.<sup>2</sup>

The fundamental basis for the certification is evident in paragraph 6.e of the certification (pages 8-9). The Commissioner first finds that “the structure and function of the resident biological community in Flagstaff Lake is the structure and function that would be expected to exist in a water storage reservoir with a drawdown of similar magnitude.” This, in combination with the finding that limiting the winter drawdown to less than 24 feet would not protect “all existing and designated uses, including hydropower generation and flood control,” leads to the conclusion that “[t]herefore there is reasonable assurance that the applicant’s proposals...will be adequate to ensure that these waters will be suitable for the designated use of habitat for aquatic life and that all applicable numeric and narrative standards for these waters will be satisfied....”

The analysis expressed in paragraph 6.e. is an entirely new interpretation of the state water quality standards, is at odds with prior longstanding DEP interpretations, and appears intended to effectuate recent legislation (L.D. 1059) which has not received EPA approval (and which EPA has indicated would likely not be approved in the absence of a UAA (see, e.g., EPA’s March 26,

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<sup>2</sup>References: (1) ME DEP/WB internal memo dated May 11, 1993. (2) ME DEP/DEA internal memo dated September 25, 1995. (3) ME DEP letter to CMP dated November 7, 1995. (4) ME DEP/DEA letter to CMP dated February 14, 1997. (5) ME DEP/DEA internal memo dated November 6, 2003.



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2003 letter to David Van Wie at Maine DEP(attached).<sup>3</sup> Indeed, this “what you see is what you get” approach to evaluating water quality standards compliance for existing hydropower projects is similar to legislation that was passed in 1992 (P.L. 1992, c. 813), which EPA disapproved as being inconsistent with federal law. See January 14, 1993 letter from EPA to DEP, attached hereto. EPA’s objection to the 1992 legislation was that it created a subcategory of the “habitat and aquatic life” use for GPA waters that contained lower than Class C criteria, and that this “downgrading” bypassed federal regulations which require a state to perform a structured scientific and technical study (a UAA) and to provide for public participation before downgrading standards. The provisions which EPA disapproved changed the criteria for certain existing impounded waters to basically require support only for that portion of the resident biological community that currently inhabits the existing impoundment. This approach is essentially the same approach that DEP has now taken in the Flagstaff Project certification, also without the benefit of a UAA and also, we believe, in violation of state and federal law.

Following EPA’s disapproval of P.L. 1992, c.813, the State prepared a UAA for the Ripogenous impoundment, which EPA approved in March, 1993. We strongly believe that the correct approach for the State to take with the Flagstaff Project is, similarly, to conduct a use attainability analysis, a process which allows the consideration of economic and environmental factors. EPA has recommended this approach for the Flagstaff Project since at least 1995. A UAA involves the assessment of alternatives and their costs that (1) provide for use attainment without a downgrade of designated uses, or (2) provide the highest level of use attainment feasible, if a downgrade appears justified. The UAA may be used as the supporting basis to remove or lower a designated use if the analysis demonstrates that attaining the designated use is not feasible due to one or more of the factors at 40 C.F.R. § 131.10(g). The State should conduct a UAA to determine the extent to which Flagstaff Lake may depart from Class C criteria. As we have offered in the past, we would be happy to further discuss the UAA process with the State.

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<sup>3</sup>In a conversation on November 10, 2003 among EPA staff, Commissioner Gallagher and Andrew Fisk of DEP, and Matt Manahan and Al Wylie on behalf of Florida Power and Light (“FPL”), DEP stated that was changing its “policy interpretation” of the water quality standards as they existed before the adoption of L.D. 1059. Rather than comparing a storage reservoir to a natural lake as it has done since 1995, DEP stated it now plans to compare storage reservoirs to other impoundments with similar drawdowns (consistent with newly adopted L.D. 1059). The Flagstaff certification is the first instance of DEP’s implementation of this new “interpretation.” Apart from L.D. 1059, which is not effective for federal law purposes (including § 401 certifications), we see no basis in state law to support analyzing compliance with Class C criteria by comparison to other impoundments with similar drawdowns.

